

Clarification of the approach to be taken to pre-funded places attracting element 1 and 2 funding from ESFA

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PM v Worcestershire County Council [2022] UKUT 53 (ACC)

Headline Importance

1. The case clarifies (1) the approach to be taken to pre-funded places attracting element 1 and 2 funding from ESFA [44]-[51] (2) suggests that new evidence contradicting evidence given by a witness may justify an application to set aside a FTT decision [52]-[59] (3) that a former failure by an education provider to provide EHCP provision may render such a provider unsuitable [60]-[63].id est.

Summary

2. The case concerned a section I appeal where the appellant sought placement at an independent college approved under section 41 of the Children and Families Act 2014 (“**the special post-16 institution**”) whilst the respondent proposed a mainstream college (“**the further education college**”). The difference in costs was some £18,797 and in first instance it was considered incompatible with the efficient use of the local authority resources to name the special post-16 institution. The appeal considered three grounds which amount to the following (1) whether the first-tier tribunal (“FTT”) erred in calculating the comparative cost of each placement by taking into account £11,000 of Education and Skills Funding Agency (“**ESFA**”) cost that was payable to the special post-16 institution and which, on the evidence before the Court, was pre-funded and thus payable to the independent college whether or not the appellant received the place (a difference of £1,000 when one factored in the £10,000 that the first tier tribunal concluded would be payable by ESFA to the further education college) (2) whether the FTT erred in accepting the further education college’s evidence that Speech and Language Therapy provision would not

increase its expenditure (3) whether a previous failure by the further education college to provide speech and language therapy was fatal to the FTT's conclusion that it was a suitable placement.

Commentary

3. The appeal was academic when heard but considered relevant for the purposes of guidance. The Court intimated that the third ground would have succeeded but that the first two would have not. Practitioners should keep two matters in mind (1) that ESFA high end funding places are to be notified to ESFA by local authorities (see [46]). That, when assessing comparative cost, it is often appropriate to subtract the ESFA funding element since it is not a local authority cost (2) previous failures by a provider to ensure full EHCP provision may render them unsuitable (though the author reminds readers that a failure by a local authority to secure provision provided for in section F of an Education Health and Care Plan gives rise to a cause of action through Judicial Review).

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